(G-43)

IN THE

Supreme Court of the United States

October Term 1975
No. 75-831

GRIFFIN, INC.,

Appellee,

against

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY, and JOHN WILLEY,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT.

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinion Below

The opinion and order of the three-judge District Court filed October 20, 1975 is set out on pages 41-61 of the Appendix. It is reported at 404 F. Supp. 738.

Jurisdiction

The opinion and order of the three-judge District Court was entered on October 20, 1975. The notice of appeal was filed in the office of the Clerk of the United States District Court for the District of Vermont on November 10, 1975. The

case was docketed December 11, 1975 and on February 23, 1976 this Court noted probable jurisdiction. The jurisdiction of this Court rests upon 28 United States Code § 1253

Statute of the United States Involved

Title 28 U.S.C. § 1341 (Popularly referred to as the Johnson Act):

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Statutes of the State of New York

New York Tax Law, §§ 1101(b)(5), 1101(b)(8)(i), 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134, 1135, 1138 and 1140.

New York Civil Practice Law and Rules, §§3001, 6301 and 6311.

These statutes of New York are set forth as Appendix A to this brief.

Question Presented

Was the Court below in error when it determined that the two alternate methods of relief open to appellee for reviewing the applicability of the New York State Tax Law to its business provided for under New York Law, *i.e.*, *A.* Administrative and judicial review of the Tax Commission's decision as provided for by Article 78 of the New York Civil Practice Law and Rules and *B.* An action for a declaratory judgment in the courts of the State of New York, were not plain, speedy, or adequate remedies for the appellee within the meaning and intent of 28 U.S.C. § 1341?

The three-judge District Court below held that neither is plain, speedy and efficient within the meaning of 28 U.S.C. § 1341.

Statement of the Case

The appellee is a Vermont corporation which has a place of business in Arlington, Vermont. It is engaged in the retail sale of furniture and gift shop items. A substantial portion of the appellee's sales are made to persons who are not residents of Vermont. Appellee's store is located approximately 25 miles from the Massachusetts-Vermont border and approximately 6 miles from the New York-Vermont border. A large portion of these interstate sales are to residents of New York State. The New York State sales tend to be concentrated to persons in the Albany-Schenectady-Troy area which is fairly close to New York border, although sales are made on occasion to other parts of the State of New York.

Some of the articles purchased from the appellee by New York State residents are carried away from the store by the residents and some articles (particularly when furniture is involved) are delivered to New York in trucks owned by the appellee. Such deliveries are made by employees of the appellee and since the furniture sometimes requires assembling or setting up, such as the attachment of legs to a table, which assembling is done by employees of the appellee, it makes it impractical to use common carriers to deliver furniture.

The appellee's advertising reaches into New York State. It advertises through advertising media located in the Albany-Schenectady-Troy area of New York and includes radio advertising, television advertising, newspaper advertising and roadside sign located on a New York highway. The facilities for the radio and television stations are located entirely within New York State. Appellee's newspaper advertising is in a weekly joint television listing section of two newspapers

which are published in Albany, New York and which are circulated primarily in the Albany-Schenectady-Troy area of New York.

The appellee also sends repairmen into New York State to service complaints.

The New York State sales tax is imposed on the receipts of every retail sale of tangible personal property. A sale is defined in section 1101(b)(5) of the New York Tax Law as "any transfer of title or possession, or both *** in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service *** for a consideration or any agreement therefor."

A vendor is personally liable for the collection and remittance to the New York State Department of Taxation and Finance of the sales tax, but the tax itself is not on the vendor. The sales tax is on the purchaser of the merchandise.

Based upon the contacts that the appellee has with New York State and on the admitted fact that employees of the Appellee deliver merchandise in appellee's own truck and that the appellee transfers possession of the merchandise in New York State, the appellants, to determine if the appellee is a vendor as defined by section 1101(b)(8)(i) of the Tax Law of the State of New York and to determine if the appellee is subject to the responsibilities of a vendor as set forth in the provisions of section 1105(a), 1105(c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York (Appendix A) in regard to the collection and remittance of sales tax to the State of New York on those sales of tangible personal property delivered by it into New York State, sent a tax examiner to the appellee's place of business in Vermont to examine the appellee's books and records to ascertain if any sales tax was owed by the appellee to the State of New York. It should be noted that the State of New York is not seeking to impose sales tax on those goods sold to New York residents at

the appellee's place of business in Vermont and delivered to the purchasers in Vermont. The State of New York is seeking to have the appellee collect and remit to the State of New York the sales tax only on those goods which are delivered by the appellee into the State of New York. The examiner was denied access to the appellee's records and books.

On April 23, 1975, the appellants again went to the appellee's place of business to conduct an audit and appellee again refused to permit an audit and served the tax examiner with the complaint which commenced the present lawsuit.

The appellee brought an action in the United States District Court for the District of Vermont seeking a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process and Equal Protection clauses of the Constitution. The appellee also sought injunctive relief.

The appellants moved to dismiss on the grounds that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State" (28 U.S.C. § 1341).

A three-judge court was convened and a hearing was held on August 1, 1975.

The three-judge court by judgment and order dated October 20, 1975, denied the appellants' motion to dismiss and granted the appellees a temporary injunction enjoining the appellants from attempting to collect the tax assessed against the appellee and ordered the appellants to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in abeyance pending a determination of the matter on the merits.

Appellants appealed to this court from that judgment and order pursuant to the provisions of 28 U.S.C. § 1253.

This court noted probable jurisdiction on February 23, 1976.

ARGUMENT

POINT I

Since the appellee has a plain, speedy and efficient remedy in the Courts of the State of New York, the Court below erred in not dismissing the action for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1341.

The appellee in its complaint sought to have the appellants enjoined in the enforcement and execution of various provisions of the New York State Tax Law.

However, Title 28 U.S.C. 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This restriction upon the power of the United States District courts in enjoining the enforcement of state tax laws has been interpreted on numerous occasions by this Court. In *Matthews* v. *Rogers*, 284 U.S. 521 (1932), this Court said:

> "The scrupulous regard for the rightful independence of state governments which should be at all times actuate the federal courts and a proper reluctance to interfere by injunction with the fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, the Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the Courts, of the United States. If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the complaint may be brought to this Court for review if a federal questions be involved."

In *Great Lakes Co.* v. *Huffman*, 319 U.S. 293 (1943) this Court held:

> "* * * it is the Court's *duty* to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." *Id.* at 300-301 (emphasis supplied).

Accordingly, although the District Court's exercise of discretion in actions seeking equitable relief is undeniably broad, this Court in *Great Lakes Co.* v. *Huffman, supra,* made it abundantly clear that "it is the Court's duty to withhold such relief" under the Johnson Act, *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, 300. As the Court in *City of Houston* v. *Standard-Triumph Motor Company,* 347 F. 2d 194 (5th Cir., 1965) cert. den. 382 U.S. 974 (1966) quite properly observed:

> "Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by that enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available." *Id.* at 199.

Accordingly, the propriety of the consideration of the Court below should have revolved around the question of whether or not the legal remedies afforded to the appellee by New York State are plain, speedy and adequate.

It is submitted that the legal remedies provided by New York State are plain, speedy and adequate.

The State of New York provides the appellee with two methods of relief: A. An administrative hearing before the State Tax Commission at which testimony would be taken and

evidence received to support the position of the appellee. If the determination of the State Tax Commission is adverse to the appellee it may bring a proceeding for judicial review pursuant to Article 78 of the New York Civil Practice Law and Rules; B. The appellee has a second mode of relief available in the New York State Courts by an action for declaratory judgment.

A. Administrative Remedies

New York Tax Law, § 1138, provides for a state administrative review by the State Tax Commission. A hearing is provided before the State Tax Commission and judicial review of the determination of the State Tax Commission is specifically authorized by Tax Law, Article 28, by way of a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules.

The Federal Courts have repeatedly found the available state tax remedies by way of Article 78 review to be adequate. See *Amer. Commuters Ass'n.* v. *Levitt*, 279 F. Supp. 40 (S.D.N.Y., 1967), affd. 405 F. 2d 1148 (2d Cir., 1969); *Hickman* v. *Wujick*, 333 F. Supp. 1221 (E.D.N.Y., 1971); *Collier Advertising Service* v. *City of New York*, 32 F. Supp. 870 (S.D.N.Y., 1940). As the Court in *Collier* noted at 872:

> "Art. 78 *** provides for review in the nature of the old time certiorari proceeding, for a stay *** for a raising of constitutional and jurisdictional questions *** [and] for restitution ***"

It should be noted that the appellee in the present case has not only exhausted its administrative remedies but it has not even begun to pursue its administrative remedies.

The appellee contended in the Court below that it should not have to use the administrative remedies available to it because the remedies are not plain, speedy or efficient. This conclusion is based on the argument that the appellee will

have to post a bond or pay the assessment before it can commence a proceeding under Article 78 of the Civil Practice Law and Rules to review a decision of the New York State Tax Commission that it is subject to taxes.

The flaw in this reasoning is that the appellee is presupposing that it will not be successful at a formal hearing held before the New York State Commission.

The New York State Tax Commission has the obligation to hold formal hearings when tax assessment is challenged and evaluate all of the evidence submitted at the hearing. It is not required that the tax be paid or a bond posted prior to receiving a formal administrative hearing. The determination of the State Tax Commission must be based upon the evidence presented. It may not be an arbitrary or capricious determination, *Matter of Pell* v. *Bd. of Education*, 34 N Y 2d 222 (1974). The appellee will be given a hearing at which it may present any and all evidence to support its position that it is exempt from taxation by New York State. If it sustains its position that it is exempt from taxation by New York State, the New York State Tax Commission will grant it the exemption and thus end the entire proceeding. The whole matter could be resolved at no more expense than it would cost to appear at a hearing and produce evidence to support its position. The only time that the appellee must post a bond is if the New York State Tax Commission rendered a determination adverse to the appellee and the appellee commenced an Article 78 proceeding for judicial review of the determination of the State Tax Commission.

In the event that the appellee pays the tax and it is decided by the State Tax Commission that the appellee is exempt from taxation, the appellee's payment would be refunded with interest at the rate of six percent *per annum* upon such payment as is authorized by New York Tax Law, § 1139(d). See *Matter of Brodsky* v. *Murphy*, 25 N Y 2d 518, 522 (1971).

It is submitted that the appellee has a plain, speedy and adequate remedy under the administrative-judicial review remedy provided by the laws of the State of New York.

B. Action for Declaratory Judgment in New York State Courts.

(1)

New York Civil Practice Law and Rules, § 3001, provides for actions for declaratory judgment in the New York State Supreme Court for decision as to the applicability or constitutionality of the Tax Laws of the State of New York. The Courts of New York have held in respect to tax statutes, that "an action for a declaratory judgment may be maintained, despite the provisions of a taxing statute which provides that the method of judicial review presented therein shall be exclusive, where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional or that the statute by its own terms does not apply in a given case". In the *Matter of First National City Bank* v. *City of New York Finance Administration*, 36 N Y 2d 87 (1975); *Richfield Oil Corporation* v. *City of Syracuse*, 287 N.Y. 234, 239 (1942); see also *Dun & Bradstreet, Inc.* v. *City of New York*, 276 N.Y. 198, 206 (1937); *Socony-Vacuum Oil Co.* v. *City of New York*, 247 App. Div. 163 (1st Dept., 1936), affd. 272 N.Y. 668 (1936); *Yonkers Raceway, Inc.* v. *City of Yonkers*, 66 Misc 2d 589, 593 (Sup. Ct., West. Co., 1971). The above cases permitting declaratory judgment actions in cases of municipal taxation have been held applicable to state taxation as well. *Hudson Transit Lines, Inc.* v. *Bragalini*, 11 Misc 2d 1094, 1096-7 (Sup. Ct., N.Y. Co., 1958) see also *Peters* v. *Tax Commission*, 18 A D 2d 880 (1st Dept., 1963), affd. 13 N Y 2d 1148 (1964).

The New York State Court of Appeals in the most recent case on the subject, *Slater* v. *Gallman, et al.*, ... N Y 2d .... (decided November 20, 1975) held:

> "To be sure, a tax assessment may be reviewed in a manner other than that provided by statute where the constitutionality of the statute is challenged or a claim is made that the statute by its own terms does not apply (*First Nat. Bank* v. *City of New York*, 36 NY2d 87, 92-93; *Richfield Oil Corp.* v. *City of Syracuse*, 287 NY 234, 239) and where the assessment is wholly fictitious and is made without any factual basis solely to extend a period of limitations (*Brown* v. *New York State Tax Comm.*, 199 Misc 349, 353-354, affd 279 App Div 837, affd 304 NY 651)."

In the recent case of *Hospital Television Systems, Inc.* v. *New York State Tax Commission*, 41 A D 2d 576 (3d Dept., 1973) affd. 36 N Y 2d 746, a case which challenged a decision of the State Tax Commission and which involved the question of the constitutionality of the application of section 1138 of the New York Tax Law (the same section of the Tax Law which the appellee contends is being unconstitutionally applied to it), the New York State Appellate Division (Third Department) said:

> "Section 1140 of such tax law states that the remedies provided by section 1138 are exclusive. It is well recognized that when a taxing authority jurisdiction is challenged on the ground that the statute is unconstitutional or inapplicable, resort need not be had to the method of review prescribed in the taxing statute (*Richfield Oil Corp.* v. *City of Syracuse*, 287 N.Y. 234, 239.)"

The New York State Court of Appeals in the recent case of *First National City Bank* v. *City of New York*, 36 N Y 2d 87 (1975), said (at page 92):

> "When a tax statute, however, is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive'; the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided

in it (see *Richfield Oil Corp.* v. *City of Syracuse*, 287 N.Y. 234, 239; *Dun & Bradstreet* v. *City of New York*, 276 N.Y. 198, 206-207; *Secony-Vacuum Oil Co.* v. *City of New York*, 247 App. Div. 163, 166-167, affd. 272 N.Y. 668)."

The Federal courts have also held that the action for declaratory judgment in the State of New York is a plain, adequate and speedy remedy.

In the recent decision of the United States District Court, *Ammex Warehouse Co., Inc., et al.* v. *Gallman, et al.*, (unreported, N.D.N.Y. 72 Civ. 306; 72 Civ. 310), affd. 414 U.S. 802 (1973), in which the plaintiffs brought an action in the Federal Court to have New York State Tax Law, § 1138 declared unconstitutional as applied to plaintiffs, the three-judge Court in a memorandum decision by Judge KAUFMAN held:

"***we are of the view that at this juncture we are without jurisdiction to consider this claim. Congress has provided that 'The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.' 28 U.S.C. § 1341. We believe such a remedy is available in the New York courts. N.Y. Civil Practice Law and Rules § 3001 (McKinney's 1970) provides that the state supreme court may issue declaratory judgments. There is ample authority that a declaratory judgment action may be employed to challenge imposition of a tax. *See, e.g.*, Richfield Oil Corp. v. City of Syracuse, 287 N.Y. 234 (1942); Hudson Transit Lines, Inc. v. Bragalini, 172 N.Y.S. 2d 423 (Sup. Ct. 1958). Accordingly, Ammex may present its arguments in the state supreme court and seek a declaratory judgment from that court that application of these taxes to Ammex's export operations is unconstitutional. The parties could seek ultimate review in the United States Supreme Court. 28 U.S.C. § 1257. We find unpersuasive Ammex's contention that the apparent inability of the state supreme court to issue an injunctive order barring collection by the State Tax Commission

pending a final decision renders a declaratory judgment action inadequate under 28 U.S.C. § 1341."

For the Court's convenience, a copy of the district court's memorandum decision in the *Ammex* case, is attached as Appendix B to this brief. See also the case of *West Publishing Company* v. *McColgan*, 138 F. 2d 320 (C.C.A. 9th Cir., 1943), where plaintiff who was not qualified to do business in California and who had no property in California, brought an action for declaratory judgment in the Federal court to declare California's corporation income tax void as denying due process of law and imposing a burden upon interstate commerce. The Federal court held that the action was not within the jurisdiction of the Federal District Court where the California law provided an adequate remedy in its State Courts.

(2)

Although the appellee has a right to a declaratory judgment in the courts of the State of New York, it inferred in the Court below that an action for a declaratory judgment in the State courts is not adequate because the appellee could not get injunctive relief pending the final determination by New York's highest court, the Court of Appeals.

Under the provisions of section 6301 and 6311 of the New York Civil Practice Law and Rules, the appellee could apply for, and if circumstances warrant, obtain a preliminary injunction against the appellants to enjoin the appellants from collecting taxes pending a determination of the case by the State courts.

Section 6301 of the New York Civil Practice Law and Rules provides as follows:

"Grounds for preliminary injunction and temporary restraining order. A preliminary injunction may be granted in any action where it appears that the defendant

threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed, or continued during the pendency of the action, would produce injury to the plaintiff."

Section 6311 of the New York Civil Practice Law and Rules provides as follows:

"§ 6311. Preliminary injunction.

"1. A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

"2. Notice of motion for a preliminary injunction to restrain state officers or boards of state officers under the provisions of this section must be upon notice served upon the defendant or respondent, state officers or board of state officers and must be served upon the attorney general by delivery of such notice to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county."

A preliminary injunction may be obtained against State officials as long as the officials are put on notice that the appellee is making a motion for a preliminary injunction or temporary restraining order (*cf., McArdle* v. *Comm. of Investigation*, 41 A D 2d 401 [3d Dept., 1973]).

It is therefore possible for the appellee to apply for and if circumstances warrant obtain the injunctive relief that it seeks in the courts of the State of New York.

The dual remedies of a declaratory judgment action and administrative agency review have been held to constitute an adequate review for purpose of invoking the dictates of the Johnson Act (28 U.S.C. 1341). *American Commuter Ass'n.* v. *Levitt*, 279 F. Supp. 40 (S.D.N.Y., 1967), affd. 405 F. 2d 1148 (2d Cir., 1969); *Hickman* v. *Wujick*, 333 F. Supp. 1221 (E.D.N.Y., 1971); *Collier Advertising* v. *City of New York*, 32 F. Supp. 870 (S.D.N.Y., 1940); See also *Jones* v. *Township of North Bergen*, 331 F. Supp. 1281 (D.C.N.J., 1971); *Zenith Dredge Company* v. *Corning*, 231 F. Supp. 584, 588-589 (W.D. Wisc., 1964); *Gray* v. *Morgan*, 251 F. Supp. 316 (W.D. Wisc., 1966) affd. 371 F. 2d 172 (7th Cir., 1966), cert. den. 386 U.S. 1033 (1967); *Abernathy* v. *Carpenter*, 208 F. Supp. 793 (W.D. Mo., 1962), affd. 373 U.S. 241 (1963); *Carson* v. *City of Fort Lauderdale*, 293 F. 2d 337 (5th Cir., 1961); *Aronoff* v. *Franchise Tax Board*, 348 F. 2d 9 (9th Cir., 1965); *City of Houston* v. *Standard-Triumph Motor Company*, 347 F. 2d 194 (5th Cir., 1965), cert. den. 383 U.S. 974 (1966); *Bussie* v. *Long*, 254 F. Supp. 797 (E.D. La., 1966); *Carbonneau Industries, Inc.* v. *City of Grand Rapids*, 198 F. Supp. 627 (W.D. Mich., 1961.)*

It is clear that 28 U.S.C. § 1341 is applicable to the present case since the appellee has a plain, speedy and efficient remedy before the New York State Tax Commission and in the New York State courts.

It appears that the appellee is contending that a better remedy would be available in the Federal courts. It is submitted that neither the judicial decisions nor section 1341 requires that the State remedy be the best remedy available or

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* Indeed several of these cited cases have held that one of the two remedies (available in New York) would suffice to fall within the confines of the Johnson Act requirement of adequate state remedies, *e.g., Abernathy* v. *Carpenter, supra.*

even equal to or better than the remedy which might be available in the Federal courts. Section 1341 merely requires that the State remedy be plain, speedy and efficient. *Bland* v. *McHann*, 463 F. 2d 21, 29 (5th Cir., 1972), cert. den. 410 U.S. 966 (1973); *Miller* v. *Bauer*, 517 F. 2d 27 (7th Cir., 1975).

Since the appellee has the same plain, speedy and efficient remedies in the courts of the State of New York that it would have in the Federal courts, and in view of the provisions of 28 United States Code § 1341, the Court below erred in not dismissing the complaint for lack of subject matter jurisdiction and it erred in granting the preliminary injunction to the appellee against the appellants.

It should be noted that the appellee, if there is an adverse decision in the courts of the State of New York, may petition this Court to review any decision of the Court of Appeals of the State of New York which appellee might feel wrongfully interpreted its constitutional rights with regard to the applicability of the New York State Tax Law to its business.

It is submitted that the courts of the State of New York are without doubt competent to decide federal questions raised before them and have the duty to do so. *Robb* v. *Connolly*, 111 U.S. 624; *Defiance Water Co.* v. *Defiance*, 191 U.S. 184 (1903). The Court below should have deferred the interpretation placed on a New York State Tax statute to the Courts of the State of New York. *Cf., United Airlines* v. *Makin*, 410 U.S. 623, 629 (1973); *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 210 (1960); *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 337 (1944).

POINT II

The admitted activities of the appellee establish sufficient local contact and sales with and within the State of New York to make the appellee amenable to suit in Courts of the State of New York.

It is submitted that the Court below erred when it held that the appellee's contacts with New York were minimal.

For the sole purpose of expediting proceedings in the District Court with respect to the appellants' motion to dismiss the Complaint and the appellee's motion for a preliminary injunction a stipulation was entered into between the attorneys for the appellants and appellee. It was entered into without prejudice to the right of either party to prove different or additional facts at later stages of the action.

In that stipulation (pages 24-30 of Appendix) the appellee, whose store is only six miles from the New York border, conceded that it does deliver merchandise into New York State in trucks owned by the appellee and that it sends repairmen into New York to service merchandise it sells. The appellee therein admitted that it advertises on radio and television stations located in New York State and in newspapers published in New York. For the purposes of the stipulation, the appellee would not declare how often it delivers into New York State, or whether it was done on a regular basis. Nor would the appellee disclose a dollar amount of business it does delivering into New York State. Based on this alone, the Court below was in error in prejudging the merits of the case and without further proof finding that the appellee's contacts with New York State were minimal.

It is submitted that the facts that the appellee delivers merchandise into New York State in its own trucks; sends repairmen into New York State to repair the merchandise; contracts with radio and television stations located wholly and solely

within New York State to carry its advertising; and contracts with newspapers published solely in New York State to carry its advertising on a weekly basis (which advertising directly solicits New York residents by the fact that the map in the advertising specifically sets forth a map from the Albany, Troy, Cambridge areas of New York to the appellee's place of business in Vermont) (page 30 of Appendix), constitute local activity by the appellee with and within New York State for sales tax purposes, *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33 (1939). They also constitute the doing of business in the State of New York which would give the courts of New York State jurisdiction over appellee for all actions and proceedings which it would chose to bring against the New York State Tax Commission.

It is these continuous and systematic activities of the appellee which give the appellee "presence" within the State of New York. The appellee, by its activities in the State of New York, is enjoying the benefits and protection of the laws of the State of New York.

If the appellee is going to continue to conduct business in the State of New York, it must submit to the obligations which arise out of or are connected with its activities within the State. *International Shoe Co.* v. *Washington*, 326 U.S. 310. Such an obligation would be to collect a sales tax on those goods and merchandise which it delivers into the State of New York. Even though the appellee claims it is engaged in interstate commerce, it is required to collect and pay sales taxes to the State from which it receives vast benefits and privileges, *cf. Northwestern Cement, Co.* v. *Minnesota*, 358 U.S. 450. It is submitted that the appellee's activities which establish the "presence" within the State of New York subject it to taxation by the State. If the appellee feels that it should be exempt from taxation by the state, it has adequate remedies in the courts of the taxing state to assert its exemption *(cf. International Shoe Co.* v. *Washington, supra)*.

As Mr. Justice Black said in his concurring opinion in *International Shoe Co.* v. *Washington:*

> "Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries, as we have held before. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313."

CONCLUSION

Appellants pray that the order and judgment of the Three-Judge Federal Court below, which denied appellants' motion to dismiss for lack of jurisdiction be reversed and that the complaint be dismissed.

Dated: March 31, 1976

Respectfully submitted,

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APPENDIX A

Statutes of the State of New York

New York Tax Law, § 1101(b):

"(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

New York Tax Law, § 1101(b)(8):

"(8) Vendor. (i) The term "vendor" includes:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed by this article;

"(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article; and

"(D) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the tax commission to collect such tax by part IV of this article;

"(E) The state of New York, any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state of Canada) or political subdivisions when such entity sells services or property of a kind ordinarily sold by private persons."

New York Tax Law, § 1105(a):

"(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

New York Tax Law, § 1105(c):

"(3) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except such services rendered by an individual who is engaged directly by a private home owner or lessee in or about his residence and who is not in a regular trade or business offering his services to the public, and except any receipts from laundering, dry-cleaning, tailoring, weaving, pressing, shoe repairing and shoe shining, and except for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law, and except such services rendered on or after August first, nineteen hundred sixty-five with respect to commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than with respect to articles purchased for the original equipping of a new ship); provided, however, that nothing contained in this paragraph shall be construed to exclude from tax under this paragraph or under subdivision (b) of this section any charge, made by a person furnishing service subject to tax under subdivision (b) of this section, for installing property at the premises of a purchaser of such a taxable service for use in connection with such service."

New York Tax Law, § 1131(1):

"(1) 'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

New York Tax Law, § 1132(a):

"(a) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state."

New York Tax Law, § 1133(a):

"(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax."

New York Tax Law, § 1134. Registration.

"On or before August first, nineteen hundred sixty-five, or in the case of persons commencing business or opening new places of business after such date, within three days after such commencement or opening, every person required to collect any tax imposed by this article and every person purchasing tangible personal property for resale shall file with the tax commission a certificate of registration in a form prescribed by it. In addition to those persons required to register pursuant to the preceding sentence, on or before June first, nineteen hundred sixty-six, or in the case of persons commencing business or opening new places of business after such date, within three days after such commencement or opening, every person selling tangible personal property for resale shall also file such a certificate. The tax commission shall within five days after such registration issue, without charge, to each registrant a certificate of authority empowering him to collect the tax and a duplicate thereof for each additional place of business of such registrant. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the registrant. A registrant who has no regular place of doing business shall attach such certificate to his cart, stand, truck or other merchandising device. Such certificates shall be nonassignable and nontransferable and shall be surrendered to the tax commission immediately upon the registrant's ceasing to do business at the place named. However, a person who is presently registered pursuant to the provisions of title G, M, N or V of chapter forty-six of the administrative code of the city of New York or under any retail sales, compensating use, consumer's utility, admissions and dues or hotel room occupancy tax imposed by a city, county or school district pursuant to the provisions of chapter two hundred seventy-eight of the laws of nineteen hundred forty-seven, as amended, need not register again under this article unless the tax commission shall require him to do so. A person other than one described in clauses (A), (B) and (C) of paragraph (8), of subdivision (b), of section eleven hundred one, but who makes sales to persons within the state of tangible personal property or services, the use of which is subject to tax under this article, may if he so elects file a certificate of registration with the tax commission which may, in its discretion and subject to such conditions as it may impose, issue to him a certificate of authority to collect the compensating use tax imposed by this article."

New York Tax Law, § 1135. Records to be kept.

"Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may be regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately. Such records shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer."

New York Tax Law, § 1138. Determination of tax.

"(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the

person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

"(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any

person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy assessment is made, as soon as notice thereof is given to him personally or by registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivision (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax commission determines that the expenses of con-

servation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

"(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, co ting thereto."

New York Tax Law, § 1140. Remedies exclusive.

"The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by any action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules."

New York Civil Practice Law and Rules, § 3301. Declaratory judgment.

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

New York Civil Practice Law and Rules, § 6301. Grounds for preliminary injunction and temporary restraining order.

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tendering to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

New York Civil Practice Law and Rules, § 6311. Preliminary injunction.

"1. A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

"2. Notice of motion for a preliminary injunction to restrain state officers or boards of state officers under the provisions of this section must be upon notice served upon the defendant or respondent, state officers or board of state officers and must be served upon the attorney general by delivery of such notice to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county."